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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

WILLIAM W. WATTS AND DAVID A. Sachs, Petitioners, v. THE UNITED STATES, HENRY C. Pettit, United States Marshal for the District of Indiana, and Robert Metzger, Sheriff of Marion County, Ind.	Nos. 15 and 16, Original.

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BRIEF FOR THE UNITED STATES.

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STATEMENT.

It is argued on behalf of petitioners that even if the District Court acquired jurisdiction over the property of M. Zier & Co., by virtue of the bankruptcy proceedings in that court, it had no right, by summary process, to disturb the possession of the State court; and hence the contempt proceedings to enforce its jurisdiction were void.

Assuming the proposition of counsel to be correct, and that the rule of comity forbids a United States court, sitting in bankruptcy, from summarily seizing property over which it has acquired jurisdiction out of the hands of a State court, the answer is that we have here no such case. A careful examination of the record will convince the court that the District Court did not take, or attempt to take, summary possession of the property in the hands of the State court, but, on the contrary, duly observed all the requirements of the rule of comity.

The circumstances out of which these contempt cases arose are only partially set forth in the petitions and the briefs for petitioners. A complete statement of the material facts, as they appear from the record, is therefore essential to a correct understanding of the situation.

On December 30, 1902, Joseph T. Ryerson & Son, a corporation of Illinois, by W. W. and J. R. Watts, their attorneys, filed a complaint in the Circuit Court of Floyd County, Ind., in which it was alleged, in substance, that the defendant, M. Zier & Co., a corporation of Indiana, was indebted to them and others for various amounts; that said defendant was *insolvent* and unable to meet its obligations, and that its creditors were threatening to enter suits against it, in which event its property and assets (consisting principally of a boiler manufacturing plant at New Albany, then in operation and engaged in filling unfinished orders and completing unfinished contracts) would be dissipated and materially injured. It was therefore prayed that a receiver

be appointed and that the court "make such orders as shall be necessary for the preservation of said property for the continuance of said business *for the purpose of completing unfinished contracts*, and such other and further orders as the court shall deem necessary and proper." (Petitioners' Exhibits, pp. 1–8.)

On the same day, "at chambers, in vacation," the Floyd Circuit Court entered an order which recited the appearance of the defendant, M. Zier & Co., by M. Zier, its president, and Jewett & Jewett, its attorneys, and appointed the New Albany Trust Company receiver of the property of said company, such receiver immediately qualifying and taking possession. (Petitioners' Exhibits, pp. 12, 13.)

On the 24th day of January, 1903, pursuant to a request of the receiver and an order of the court (Petitioners' Exhibits, p. 34), a creditors' meeting was held in open court for the purpose of considering the advisability of continuing the operation of the plant of M. Zier & Co. Upon that hearing it was ordered by the court that *the receiver should go on and complete all unfinished contracts*, and that he might purchase the necessary material for this purpose, *but should make no new contracts*. It was further ordered that all creditors and other persons should be and they were thereby enjoined from prosecuting any claim or suit against the estate except by intervention in that cause or by leave of the court. (Petitioners' Exhibits, pp. 37–41.)

It may be here noted that the District Court, upon its investigation of the subject, found that this order of

the Floyd Circuit Court enjoining all creditors from proceeding in any other court, was prepared and procured by the petitioner Watts without the knowledge of any other creditor or his representative. (Petitioners' Exhibits, pp. 135-136.) The judge of the Floyd Circuit Court himself testified, in the contempt cases, that this order was prepared by Watts and was not read or discussed at the creditors' meeting. (Transcript of Evidence, pp. 66–67.) See also Charles L. Jewett's testimony. (Transcript of Evidence, p. 54.)

On February 6, 1903, the Inland Steel Company, which had been represented at the creditors' meeting in the Floyd Circuit Court on the 24th of January, and two other creditors who had not been so represented, filed their petition in involuntary bankruptcy against M. Zier & Co. in the District Court of the United States for the District of Indiana. (Petitioners' Exhibits, p. 66.) That petition set forth the fact that M. Zier & Co. were indebted to the petitioners in excess of the statutory amount required to give the District Court jurisdiction; that the defendant company was insolvent, and that within four months next preceding the date of filing the petition it had committed certain acts of bankruptcy, as follows:

> *First.* Your petitioners allege upon information and belief that said M. Zier & Company did heretofore, to wit, on divers dates within four months last past, while insolvent, transfer to the firm of Joseph T. Ryerson & Son, of Chicago, and to Minnie M. Zier, of Minneapolis, Minnesota, creditors of said M. Zier & Company, certain portions of the property of the said

M. Zier & Company, with intent to prefer said creditors over and above the other creditors of said M. Zier & Company, the aggregate value of said property amounting at least to the sum of Five Hundred Dollars.

Second. That the said M. Zier & Company did, on divers dates within four months last past, while insolvent, transfer divers other portions of its said property to divers other persons, who were then and there creditors of said M. Zier & Company, and especially to Minnie M. Zier, with intent to prefer such persons over and above the other creditors of M. Zier & Company.

The petition further alleged that M. Zier & Co. had on hand a large stock of merchandise, machinery, and tools, and a large number of outstanding accounts; that under certain proceedings in a State court a receiver for said corporation had been appointed who was attempting to collect the assets of said estate and incurring expenses which must be borne by the creditors thereof; and that it was absolutely necessary for the preservation of said estate that a receiver in bankruptcy should be appointed forthwith.

Upon this petition the District Court issued an order directing M. Zier & Co. to appear in that court, as a court of bankruptcy, to be held at New Albany, on the 28th day of February, 1903, to show cause why the prayer of the petition should not be granted. (Petitioners' Exhibits, p. 69.) A copy of this order was duly served on the defendant company. (Petitioners' Exhibits, p. 71.)

Afterwards, on February 11, 1903, the Inland Steel Company filed another petition in the District Court (Petitioners' Exhibits, p. 71), in which, referring to the previous petition, it was said:

> That it is alleged in said petition that Joseph T. Ryerson & Son and other creditors therein mentioned have received certain preferences from said alleged bankrupt within four months prior to the filing of said petition, contrary to the statute in such case made and provided, while said bankrupt was insolvent; that at the instance of said Joseph T. Ryerson & Son a receiver has been appointed by the Floyd Circuit Court of Floyd County, Indiana, to take charge of the assets of said alleged bankrupt; that the New Albany Trust Company is the receiver so appointed, and that Henry E. Jewett, who is the attorney for said M. Zier & Company, is also the Vice-President of said New Albany Trust Company; that said receiver is now running the business of M. Zier & Company and is completing certain contracts, and for that purpose has employed a large number of men in the manufacturing establishment of said M. Zier & Company and has placed in charge of said plant one Michael Zier, who is the Vice-President and Treasurer of said alleged bankrupt; that said Michael Zier is wholly incompetent for said business; that he is wholly unfamiliar with bookkeeping and necessary office work, which is essential to the safe conduct of said business, and your petitioner avers that if said receiver is permitted to remain in charge that it would result in injury and detriment of such of the

general creditors of said M. Zier & Company who are entitled to participate in said bankrupt estate.

Your petitioner further states that W. W. and J. R. Watts, Attorneys at Louisville, Ky., are the attorneys for said Joseph T. Ryerson & Son in said proceedings wherein said New Albany Trust Company was appointed receiver and that said W. W. and J. R. Watts are also the attorneys for said receiver, and your petitioner fears that said receiver is friendly to said Joseph Ryerson & Son and to said alleged bankrupt to the detriment of the creditors at large of the said alleged bankrupt.

Your petitioner further alleges that it is absolutely necessary for the preservation of said estate for the benefit of all of the creditors who shall be entitled to participate therein that a receiver in bankruptcy be appointed herein forthwith to take charge of all of the assets of such alleged bankrupt and administer the same under the directions of this honorable court, with the usual powers of receivers in such cases. Wherefore your petitioner prays that a receiver in bankruptcy be appointed forthwith, and that such other and further orders be entered herein as to your honor shall seem meet and proper.

On the same day, the Inland Steel Company filed a further and supplemental petition, showing more specifically that the New Albany Trust Company had actually taken charge of the property of M. Zier & Co. as receiver. (Petitioners' Exhibits, p. 75.)

Upon these petitions an order was entered by the District Court, which, after setting forth that the Inland

Steel Company had filed "its verified petition alleging that an emergency exists for the immediate appointment by the court of a receiver herein to take charge of the property and effects of M. Zier & Co. pending the hearing of said petition, and the appointment of a trustee in bankruptcy herein," stated that "the court being advised, after due consideration, now finds that the prayer of said petition ought to be granted." That order further provided for the appointment of Frederick D. Connor as receiver, with authority to take possession of the property of M. Zier & Co. upon giving bond in the sum of $10,000, and directed the New Albany Trust Company to deliver up all of the property of M. Zier & Co. in its possession to its receiver, Connor, and to refrain thereafter from interfering in any way with his possession and control. (Petitioners' Exhibits, p. 74.)

The District Court did not, however, undertake summarily to enforce this order or direct its receiver summarily to seize the property in question out of the hands of the receiver of the State court. On the contrary, no action was taken under the order of February 11, until the 14th, when Connor, by direction of the District Court, filed a petition in the State court showing his appointment, and praying that court for an order requiring the New Albany Trust Company *immediately* to turn over to him the property in its hands as receiver of M. Zier & Co. (Petitioners' Exhibits, pp. 173–174.)

Upon this petition the Floyd Circuit Court, on the same day, entered an order stating that "*the matter of*

said petition is now continued until the next term of this court." (Petitioners' Exhibits, p. 53.)

On the same day the New Albany Trust Company, by W. W. and J. R. Watts, its attorneys, also filed a petition in the State court. (Petitioners' Exhibits, pp. 41–49.) That petition set forth the proceedings by the Inland Steel Company and other creditors in the District Court, resulting in the appointment of Connor as receiver, and stated that, with a view to avoiding a clash of jurisdiction, petitioner had caused its attorneys to communicate by telephone with Judge Anderson of the District Court, and to urge that his order appointing such receiver should not be enforced until after said matters had been presented to the State court with the request that the State court direct it and its attorneys to lay the same before the District Court, whereupon, the petition stated, Judge Anderson requested petitioners' counsel to notify Mr. Hester, the attorney for the Inland Steel Company, that the matter might be heard on Monday, February 16, 1903, at Indianapolis, and that in the meantime the order appointing Connor as receiver was not to be enforced. Petitioner then requested that it be instructed with respect to the estate in its hands pending the controversy and the adjournment of the court, and that it be directed to present the facts in the matter to the District Court, either by limited or general appearance in the suit in bankruptcy instituted therein by the Inland Steel Company, and ask such relief, if any, as the State court might direct. The petition further prayed that the

Inland Steel Company and the other petitioning creditors in the bankruptcy suit in the District Court, and Frederick D. Connor, receiver and individually, and Henry U. Pettit, marshal of the District Court, "be enjoined and restrained from in any suit, summary process or otherwise, or in any manner attempting to or ousting or taking from this receiver the possession of said estate, except by intervention herein and proper orders entered in this cause." (Petitioners' Exhibits, pp. 41–49.)

Upon this petition the Floyd Circuit Court, on the same day, February 14, issued an order enjoining the Inland Steel Company, and the other petitioning creditors, Connor, individually and as receiver, and the marshal of the District Court, as prayed. That order further provided that the New Albany Trust Company, through its attorney, should proceed to Indianapolis,

> and there, by a limited appearance and by protestation against appearance only, by petition upon such appearance only, lay before said District Court of the United States for the District of Indiana the facts with regard to the matters herein, said injunction, restraining order, and said estoppels, and to suggest to said court the orders of this court and the fact that had it been fully informed, as is believed by this court, its order with respect to the assets herein would at the most have been a direction to make an application to this court at the proper time and in the proper way for delivery of the said assets to such District Court's receiver or

trustee after proper disposition and settlement of the matters herein.

It was further ordered that the Inland Steel Company and the other petitioning creditors in the bankruptcy suit in the District Court appear and show cause why they should not be punished for contempt in disobeying the orders of the Floyd Circuit Court by prosecuting said suit. (Petitioners' Exhibits, pp. 50–53.)

On February 16, the New Albany Trust Company, through Henry E. Jewett, its vice-president, and William W. Watts, its attorney, appeared before the District Court at Indianapolis. The result is stated in the order of the District Court made the next day, February 17, as follows (Petitioners' Exhibits, p. 77):

> This cause coming on now to be heard upon the petition of Frederick D. Connor, filed herein on the 16th day of February, A. D. 1903, for the instruction of the court concerning the property and assets of said M. Zier & Company, which are now in the possession of the New Albany Trust Company, as receiver of the Floyd Circuit Court, in a suit therein pending against said M. Zier & Company, because of their insolvency; and the petitioning creditors in this cause and said Connor, receiver as aforesaid, being now present and represented by George H. Hester and William Wilhartz, their solicitors, and said New Albany Trust Company, receiver as aforesaid, being now present and represented by Henry E. Jewett, its Vice-President, and by William W. Watts,

its solicitor, and after argument by counsel, *the said New Albany Trust Company, as receiver of the Floyd Circuit Court, by its said Vice-President, having voluntarily offered and agreed, by and with the consent and approval of said William W. Watts, its solicitor, in open court, to surrender full and immediate possession* and control of the property and assets of said M. Zier & Company, in its possession or under its control, as receiver of the Floyd Circuit Court, to said Connor, as receiver of this court, upon the presentation by him to said New Albany Trust Company of a certified copy of the order for his appointment as such receiver heretofore made by this court. It is now hereby ordered by the court that said Connor, receiver as aforesaid, forthwith present a certified copy of the order for his appointment as such receiver to the said New Albany Trust Company, and immediately thereupon take full possession and control of the property and assets of said M. Zier & Company that are now in the possession or under the control of said New Albany Trust Company as receiver of the Floyd Circuit Court.

On February 19 the New Albany Trust Company, through Henry E. Jewett, its vice-president, filed a report in the Floyd Circuit Court, in which it stated that in pursuance of the order of the court, it appeared before Judge Anderson of the District Court at Indianapolis, on Monday, February 16, and "upon the hearing in that court, *this receiver stated to the Honorable Judge of said United States District Court that it was ready and willing to pay over to the receiver appointed*

*by the Honorable Federal Court * * * the property and assets of M. Zier & Co. in the hands of this receiver;"* that it had not yet been able to make up its accounts as receiver, but was preparing the same to be submitted to the court, but that it was ready to turn over all of said property to the receiver of the District Court, and prayed an order from the court authorizing it to do so. The company further asked that upon the presentation and approval of its account as receiver, its resignation be accepted and it be fully and finally discharged as such receiver. (Petitioners' Exhibits, pp. 56–57.)

Upon the receipt of this report and tender of resignation by the New Albany Trust Company, Judge Utz, of the Floyd Circuit Court, ordered that a rule issue at once against said receiver to show cause why it should not be punished for contempt. (Petitioners' Exhibits, pp. 57–58.)

On the same day Connor demanded of the New Albany Trust Company the property of M. Zier & Co. in their possession, to which that company, on the same day, made the following reply (Petitioners' Exhibits, pp. 111–112):

> In view of your demand that as receiver of the Floyd Circuit Court we deliver you the property of M. Zier & Company, as such receiver will state.
>
> We this morning filed before Judge of the Floyd Circuit Court in chambers, report, a copy of which is attached hereto. Thereupon the Judge stated orally that he wanted us to hold

> the property until our accounts as receiver were rendered and passed upon. We think this might be done to-morrow, and if you are willing to defer action until then it will relieve us of embarrassment in the premises.
>
> On the other hand, if you insist on immediate surrender of the property to you, *we are bound to say that we believe that to carry out in good faith the understanding with the Honorable Judge of the United States District Court of Indianapolis and our vice-president, H. E. Jewett, we ought to surrender the property to you at once.*

Connor declined to grant further time, and thereupon (on the 19th) the New Albany Trust Company, by Jewett, its vice-president, immediately turned over to him the building and plant of M. Zier & Co., which contained all the property of that company, excepting certain books and cash. Connor immediately took possession of the property and put watchmen in charge to hold the same for him. (Petitioners' Exhibits, p. 79.)

On the next day, February 20, Joseph T. Ryerson & Son, by W. W. Watts, its attorney, the New Albany Trust Company, as receiver, and the United States Tube Company, by D. A. Sachs, its attorney, appeared before the Floyd Circuit Court, "*in vacation, at chambers,*" and the latter company, by its attorney, presented to the Judge a statement, signed and sworn to by D. A. Sachs, in which it was set forth that the New Albany Trust Company, as receiver, had wrongfully, unlawfully, and without leave of court turned over

and surrendered the possession of the boiler plant of M. Zier & Co. in New Albany to Connor, the receiver in bankruptcy appointed by the District Court, and was threatening to and would, unless restrained, by the court, turn over to Connor all the other assets of M. Zier & Co. in its hands. The petitioner therefore prayed that the New Albany Trust Company be cited to appear before the court in Chambers, at 3 o'clock p. m. of that day, to show cause why it should not be punished for contempt, and, if the court found that the company had violated its orders as represented, that it be removed from its office as such receiver and a successor immediately appointed, and that said receiver be required to account immediately and to turn over to its successor all of the property in its hands belonging to M. Zier & Co., and for such further orders as the court might deem right and proper in the premises. (Petitioners' Exhibits, pp. 58–60.)

Upon this petition the Judge of the Floyd Circuit Court on the same day entered an order removing the New Albany Trust Company from the receivership, and directing it immediately to account for all the assets of M. Zier & Co. which came into its hands as such receiver. The order further provided for the appointment of Charles D. Kelso to succeed the New Albany Trust Company as receiver of M. Zier & Co., and directed that he immediately give bond and qualify as such receiver, and that immediately upon his qualification he demand of the New Albany Trust Company and Frederick D. Connor the immediate

possession of the property of M. Zier & Co., which came into the hands of the New Albany Trust Company as receiver therein, and if the company or Connor should fail or refuse immediately to turn over and surrender the possession of said assets to said receiver that he immediately report the fact to the Judge for further instructions. (Petitioners' Exhibits, pp. 60–61.)

Kelso having immediately qualified, he was ordered by the Judge to proceed to execute the duties of his trust, and invested with all the powers and authority theretofore possessed by the New Albany Trust Company. (Petitioners' Exhibits, p. 61.)

On the same day Kelso reported to the Judge at at chambers that he had called upon the New Albany Trust Company and demanded of it the possession of the assets of M. Zier & Co., and that said Trust Company had failed and refused to surrender the possession thereof for the reason that it had turned over the plant to Connor, and that for the other assets of said company it intended to account forthwith to the Judge of the Floyd Circuit Court; that thereupon he, Kelso, had called upon Connor and demanded of him the possession of all of the property that had been wrongfully turned over to him by the New Albany Trust Company, which Connor failed and refused to do. (Petitioners' Exhibits, pp. 62–63.)

Thereupon, the Floyd Circuit Court entered an order that a summary writ be issued, directed to the sheriff of the county, requiring him immediately to

seize and deliver to Kelso all the property which said Connor had in his possession, and that the sheriff immediately execute said writ and forthwith make return to the Judge of the Court. (Petitioners' Exhibits, pp. 63–64.)

On February 21 Connor filed a petition in the United States District Court (Petitioners' Exhibits, pp. 78–82), in which, after setting forth the facts as to the delivery of the possession of the plant of M. Zier & Co. to him by the New Albany Trust Company, and his entering upon the same on the 19th of February, he stated that he retained possession of the same until the 20th, at about 7.30 p. m.; that on that day and at that time possession of said plant and all the property of M. Zier & Co. was demanded of him by Kelso, as receiver appointed by the Floyd Circuit Court in place of the New Albany Trust Company, which demand he refused; that thereupon he was served by the sheriff and deputy sheriff of Floyd County with a certified copy of an order of the Floyd Circuit Court made in the matter of the receivership of M. Zier & Co. pending before it (the order appointing Kelso receiver), and with a writ issued by that court on February 20, 1903, to the sheriff, requiring him forthwith to take from him possession of said plant and assets; and that thereupon said sheriff forcibly took possession of the property from him and his agents, and delivered the same over to said Kelso, who immediately took and was then in possession.

The petition of Connor further stated—

> That this petitioner believes the above-stated proceedings were procured to be had by William W. Watts, Esq., of Louisville, Ky., who during the continuation of the New Albany Trust Company, as receiver of M. Zier & Company, represented said Trust Company as such; that said Charles D. Kelso is now represented by one D. A. Sachs, Esq., of Louisville, Ky., an attorney at law, and that the petitioner believes that said Sachs also assisted in procuring the orders of the said Floyd Circuit Court above set out, and the petitioner further says that he verily believes the forcible removal of said property from his possession and control as receiver appointed by this court as aforesaid was brought about by the joint action and efforts of said Charles D. Kelso, as receiver, and Charles D. Kelso, individually, and William W. Watts, as attorney for said New Albany Trust Company, and D. A. Sachs, attorney for said Charles D. Kelso, receiver.

The premises considered, the petitioner prayed the court that Kelso, as receiver and individually, Raymond J. Morris, as sheriff and individually, Claude Citizen, as deputy sheriff and individually, Thomas Smithwick, as custodian of the plant of M. Zier & Co. and individually, William W. Watts, as attorney for the New Albany Trust Company, and D. A. Sachs, as attorney for Kelso, be enjoined and restrained from in any manner taking or keeping from the possession of petitioner the property and estate of M. Zier & Co.;

that they be required and directed immediately to redeliver to such property, and that they be cited to appear at a time to be fixed by the court and show cause why they should not be punished for contempt. (Petitioners' Exhibits, pp. 78–82.)

Upon this petition, the District Court, February 21, made an order requiring the parties therein named to appear before it at Indianapolis, on February 25, to show cause why they should not redeliver the property of M. Zier & Co. into the possession of Connor as receiver of that court, and in the meantime restraining them, their agents, attorneys, servants, and employees from in any way interfering with said property or making any disposition of the same. It was further ordered that the parties named appear before the court on the day indicated and show cause why they should not be punished for contempt. (Petitioners' Exhibits, pp. 90–92.)

On the same day the United States District Attorney for the District of Indiana filed an information in the District Court against Morris, Settison, Smithwick, Kelso, Watts, and Sachs for contempt of the District Court in dispossessing its receiver of the property in question.

Watts and Sachs filed separate answers to the rule to show cause and the information against them (Petitioners' Exhibits, Vol. I, pp. 93 and 116), which were traversed by the United States Attorney (Petitioners' Exhibits, Vol. I, pp. 129, 130).

On March 14, 1903, the District Court found the petitioners guilty of contempt as charged in the information and rule, and sentenced them to imprisonment in the jail of Warren County for sixty days and to pay costs. (Opinion, Anderson, J., Petitioners' Exhibits, p. 132 *et seq.*)

ARGUMENT.

I.

The argument for petitioners, as already stated, is based upon the assumption that the District Court took summary possession of the *res* in controversy. This assumption, as the facts above detailed plainly show, is purely gratuitous. The only thing in the nature of a summary proceeding by the District Court was the order of February 11, 1903 (Petitioners' Exhibits, p. 74), appointing Connor receiver and authorizing him to take possession of the property of M. Zier & Co., and directing the New Albany Trust Company to deliver up the same to him, and to refrain from interfering with his possession and control. That order was, as has been shown, made upon the representations of the petitioning creditors in the bankruptcy suit in the District Court that the proceedings in the State court were fraudulent and collusive and in derogation of the rights and interests of themselves and other creditors, and that an emergency existed for the appointment of a receiver forthwith. The authority for such appointment is given by section 2, of the act of July 1, 1898 (30 Stats., 545), which provides that courts of bankruptcy shall have power to—

> (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the

petition and until it is dismissed or the trustee is qualified.

But, it will be observed, no attempt was ever made to enforce the order in question. On the contrary, as set forth in the petition of the New Albany Trust Company of February 14, 1903 (Petitioners' Exhibits, p. 46), the District Court stated that the order should be suspended until that company had had an opportunity to be heard. At the trial of the contempt cases, Connor testified that at the time he received the order appointing him receiver, he also received a note from the clerk of the District Court directing him to defer any action until a hearing was had on the following Monday—the 16th. (Transcript of Evidence, p. 4.) In fact, there is nothing in the record which indicates that the District Court ever intended summarily or arbitrarily to enforce that order, assuming that what it may have *intended* to do is at all material. Its action in authorizing Connor to appear in the State court and request that court to direct its receiver to turn over the property to him, evidences an entirely opposite intention—an evident intention to observe the rule of comity to the full.

On the other hand, the action of the State court in refusing to pass upon the application of Connor at the time, although requested to act immediately, and postponing any consideration of the same until the next term of the court, three weeks later, could hardly be called the observance of comity. In view of the statute, that court must have known that the District court appointed Connor receiver because, in

its opinion, the circumstances required that it immediately take possession of the property. The fact that that was the last day of the term, and the State court was about to take a vacation, is hardly an excuse for this delay. The matter might have been passed upon that very day. If not, that court was authorized (Rev. Stat. Indiana, 1897, sec. 1251) to issue such an order to its receiver in vacation. It is a pertinent fact, as showing what the State court *might* have done, if it had been so disposed, that its order appointing the New Albany Trust Company receiver was made in vacation, on the very day the petition for such receiver was filed. So, too, the orders of that court subsequent to its adjournment on February 14—the order removing the New Albany Trust Company and appointing Kelso receiver in its stead, and the order directing the sheriff to seize the property from Connor—were all made in vacation.

But it was not necessary for the District Court to wait until the Floyd Circuit Court had passed upon the application of its receiver, because, two days later, February 16, the New Albany Trust Company, by order of the State court, appeared in the District Court and then and there voluntarily offered to turn over the property. The receiver of the State court was represented on that occasion by H. E. Jewett, its vice-president, and W. W. Watts, its attorney—the latter, the District Court says, claiming that he was authorized by the judge of the State court to represent the matter to the District Court; and, after a protracted discussion, both Jewett and Watts conceded that the right to pos-

sess the property in question was in the District Court, and voluntarily offered to turn it over to the receiver of that court. (Opinion Petitioners' Exhibits, pp. 137, 138.) The assertion that this offer was not voluntarily made, but was procured by threat or duress, hardly comports with the statement of the New Albany Trust Company, in making its report to the State court of the proceedings before the District Court, "that upon the hearing in that court this receiver stated to the Honorable Judge of said United States District Court that it was ready and willing to turn over to the receiver appointed by the Honorable Federal Court * * * the property and assets of M. Zier & Co. in the hands of this receiver." (Petitioners' Exhibits, p. 56.) Nor does it comport with the reply of the New Albany Trust Company to Connor, when called upon to deliver possession, after asking time to make up their accounts to the State court, that, "On the other hand, if you insist on the immediate surrender of the property to you, we are bound to say that we believe that, to carry out in good faith the understanding with the Honorable Judge of the United States District Court of Indianapolis and our Vice-President, H. E. Jewett, we ought to surrender the property to you at once" (Petitioners' Exhibits, pp. 111–112); nor with the subsequent actual and voluntary surrender of the property by the New Albany Trust Company to Connor as receiver.

The testimony adduced at the trial of the contempt cases is conclusive upon the point that the surrender of the property of M. Zier & Co. to Connor by the

New Albany Trust Company was the voluntary act of that company. The offer or agreement to surrender was made by Jewett and Watts, as they themselves testify (Transcript of Evidence, pp. 35, 38, 39, 189, 211), because they had come to the conclusion, at the hearing before the District Court on the 16th and 17th of February, that that court had jurisdiction of the property. The fact that they, or either of them, may have received the impression that the District Court was determined to enforce its jurisdiction, if necessary, even by the use of a club (Transcript of Evidence, p. 168)—a perfectly proper thing, it would seem, *if necessary*, whenever jurisdiction exists—does not affect the character of their offer, and it is evident that they themselves did not view it in that light. The subsequent statement of Jewett to Connor, above referred to, that if he insisted he must surrender the property at once, in order to carry out *in good faith* his understanding with the District Court, absolutely repudiates any such suggestion. So the whole defense of Watts to the contempt proceedings against him was that he had endeavored to carry out *in good faith* the promise he had made to the District Court to surrender or to advise the surrender of the property, although his opinion as to the law in the case had changed. Surely if, after his return to New Albany, he was no longer of opinion that the District Court had jurisdiction, he would not have felt obliged to do all he could to carry out an agreement extorted from him by threat or compulsion and under a mistaken view of the law.

It should be borne in mind that the District Court, from the commencement of the bankruptcy proceedings in that court, was impressed with the idea that the proceedings in the State court were not only in derogation of its exclusive jurisdiction in bankruptcy matters, but a fraud upon the creditors of M. Zier & Co. Allegations to that effect were made in the petitions filed by the Inland Steel Company and others, and the District Court found, as a matter of fact, that M. Zier, the Vice-President of M. Zier & Co., and who was afterwards, as stated in the petition of the Inland Steel Company, put in charge of the plant when the New Albany Trust Company took possession as receiver, had stolen $9,600 from the funds of his corporation; that, on or about the 29th of December (the proceedings in the State court being begun on the 30th), this money was paid over to Charles L. Jewett, who, with his brother, H. E. Jewett (the latter being vice-president of the New Albany Trust Company), constituted the firm of Jewett & Jewett, attorneys, of New Albany, to be paid by Charles L. Jewett to the agent of Minnie Zier, a large stockholder of M. Zier & Co., and a sister-in-law of M. Zier, with the exception of $600, which was to be retained by him as his fee. (Opinion Anderson, J., Petitioners' Exhibits, pp. 132–133.) See also Transcript of Evidence, Connor's testimony, pp. 9, 10; Charles L. Jewett's testimony, pp. 60, 61.

The District Court also states that "since the commencement of the trial of these defendants, owing to

the startling disclosures made in the evidence here, the fraudulent preference of $9,600 has been returned and paid in money to the receiver of this court." (Opinion, Petitioners' Exhibits, p. 155.)

The District Court further found that the day before the institution of the suit in the State court by Ryerson & Son, of Chicago, that firm received $3,100 from M. Zier & Co., and that Charles M. Jewett, as the attorney and confidential adviser of M. Zier and his corporation, went to Chicago, as he himself testified, chiefly for the purpose of procuring Ryerson & Son to bring suit in the Floyd Circuit Court, at New Albany, to have a receiver appointed to wind up its affairs. (Opinion, Petitioners' Exhibits, pp. 133–134.)

At the trial of the contempt cases in the District Court, Judge Utz, of the Floyd Circuit Court, testified that if he had known of these fraudulent preferences he would not have insisted upon the jurisdiction of his court. (Transcript of Evidence, p. 112.)

It is also to be observed that, after his citation for contempt, Kelso, the receiver of the State Court, delivered the plant and property of M. Zier & Co. to the receiver of the District Court without any order of the State court in the premises, and the receiver of the District Court is now in possession of the same. (Opinion, Petitioners' Exhibits, p. 154.)

II.

The New Albany Trust Company was appointed by the Floyd Circuit Court receiver of the property of M. Zier & Co., under authority of section 1245 of the

Revised Statutes of Indiana of 1897, which provides that a receiver may be so appointed in the following case among others:

> *Fifth.* When a corporation has been dissolved, or is *insolvent*, or is in imminent danger of insolvency, or has forfeited its corporate rights.

The petition of Ryerson & Son stated that M. Zier & Co. was *insolvent*, and prayed the appointment of a receiver to take charge of its property, and "that the court shall make such orders as shall be necessary and proper for the preservation of said property *for the continuance of said business for the purpose of completing unfinished contracts*, and such other and further orders as the court shall deem necessary and proper."

So, too, the order entered by the Floyd Circuit Court, after the creditors' meeting of January 24, 1902, held for the purpose of considering whether the plant should be indefinitely continued or not (see Notice to Creditors, Petitioners' Exhibits, p. 36), directed that, in accordance with the unanimous wish of those present at that meeting, the receiver should go on and *complete all unfinished contracts*, and that he might purchase the necessary material for this purpose, *but that he should make no new contracts.* (Petitioners' Exhibits, p. 40.)

It is manifest, therefore, as the District Court held, that the proceeding in the State Court was, in substance and effect, a bankruptcy proceeding and contemplated the winding up of the business of M. Zier & Co.

III.

The jurisdiction of the District Court was not, however, dependent upon the facts just stated, as M. Zier & Co. had committed certain acts of bankruptcy. As heretofore shown, it was alleged in the petitions of the Inland Steel Company and others in the District Court, and found as a fact by that court, that only a day or two prior to the institution of the suit in the State court by Ryerson & Son that firm had received a fraudulent preference of over $3,000, and that $9,000 had been paid to Minnie Zier, a stockholder of the insolvent company, or her agent.

The provision of the Bankruptcy Law on this subject is as follows (Act of July 1, 1898, 30 Stat., 546):

> SEC. 3a. Acts of bankruptcy by a person shall consist of his having * * * (2) transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditor over his other creditors.

Whether the preferred creditor is aware at the time of payment that his debtor is insolvent, is immaterial so far as it respects the character of the transaction. If he does not know, the payment is none the less a preference. (*Pirie* v. *Chicago Title and Trust Company*, 182 U. S., 438.) But the fact that Ryerson & Son, a few days after they received the sum above named, brought suit in the State court against M. Zier & Co., and had a receiver appointed for that company because of its insolvency, is important, as it would seem to constitute an absolute bar to any defense by either

of them that the transfer of this particular portion of the debtor's property was not an act of bankruptcy, because not made while he was insolvent.

Besides, Chas. L. Jewett, attorney for M. Zier & Co., testified that when he went to Chicago to see Ryerson & Son about the institution of proceedings in the State court, he told Mr. Jackson, the agent of that firm, in reply to his inquiry whether there could not be bankruptcy proceedings if M. Zier & Co. had committed acts of bankruptcy, that the company had committed "lots of them; preferences, lot of them, and the company is insolvent." (Transcript of evidence, pp. 48, 49, 50.)

IV.

The amendment to the Bankruptcy Law contained in the act of February 5, 1903, makes the specific act here referred to—the appointment of a receiver by a State Court because of insolvency—an act of bankruptcy. That amendment alters section 3a of the original act defining acts of bankruptcy, so as to make it read:

> or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee of his property, *or because of insolvency a receiver or trustee has been put in charge of his property* under the laws of a State, or a Territory, or of the United States.

The petition of the Inland Steel Company was filed February 6, 1903, the day after this amendment took effect.

It is contended, however, that this amendment does not apply to cases in which a receiver has been appointed prior to its passage. Yet such is the plain language of the statute. The act took effect on February 5, and it made an act of bankruptcy on the part of a "person" the fact that, "because of insolvency, a receiver *has been* put in charge of his property under the laws of a State." If a suit had been instituted on that day, and the petition had alleged that a receiver of the bankrupt's estate "has been" appointed under the laws of the State, and it was shown that he had been appointed the day before, or at any time within four months of the filing of such petition, an act of bankruptcy would have been charged within the letter as well as the spirit of the statute.

The last section of the act of February 5, 1903, provides—

> That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July 1, 1898.

This is the only saving clause in the act, and would seem clearly to indicate that in all other respects the act was to go into full force and effect on the date of its passage.

In the original act, Congress expressly provided against its having the retroactive effect, which it otherwise would have had (under section 3 c.), by postponing the filing of petitions in voluntary and involuntary

bankruptcy under it until one and four months, respectively, after its passage, although declaring that the act itself should take effect on that day.

Aside from the language of the statute, it is not difficult to understand why Congress intended the act of February 5, 1903, to be retroactive. The particular provision in question was doubtless designed to prevent the very thing we have here—bankruptcy proceedings in the courts of a State or Territory in the guise of a suit for the appointment of a receiver. That situation being in the judgment of Congress a reprehensible thing, the motive and intention would be to prevent it, to enlarge the Federal scope, and therefore to make the provision retroactive and not merely prospective. With the original act it was different, as the legislation then enacted made a radical change in the existing order of things, and if it had been retroactive the result would manifestly have been most unjust and oppressive. But when this amendatory act was passed the new order was established. The particular amendment in question having for its object merely the preservation of the Federal jurisdiction, to make it retroactive was to do no injustice.

In support of the view that the act of February 5, 1903, was intended to be retroactive in certain respects, take section 13 of that act, which amends subdivision a of section 60 of the act of July 1, 1898, so as to make it read (the amendments being in italics):

> a. A person shall be deemed to have given a preference if, being insolvent, he has, *within*

four months before the filing of the petition, or after the filing of the petition, and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.*

Will it be said that the latter clause would not apply to transfers recorded or registered within four months of the passage of that act?

But, whatever the meaning of this amendment, the jurisdiction of the District Court in this case rests firmly upon the undisputed facts as to the fraudulent preferences made by Mr. Zier & Co. to Minnie Zier and Ryerson & Son.

V.

In support of the jurisdiction of the District Courts of the United States in cases of this kind, it is hardly necessary to do more than refer the court to the authorities, State and Federal, cited by Judge Anderson in his opinion. (Petitioners' Exhibits, Vol. I, p. 139 et seq.)

In re Merchants' Ins. Co., 6 N. B. R., 43.

In re Lady Bryan Mining Co., 6 N. B. R., 262.

Watson v. *Citizens' Saving Bank*, 11 N. B. R., 161.

In re Gutwillig, 90 Fed., 475.

In re Bruss-Ritter Co., 90 Fed., 651.

In re Rouse & Co., 91 Fed., 96.

Lea v. *George M. West Co.*, 91 Fed., 237.

In re Smith, 92 Fed., 135.

In re Etheridge Furniture Co., 92 Fed., 329.

In re Richard, 94 Fed., 633.

In re Lengert Wagon Co., 110 Fed., 927.

In re Storck Lumber Co., 114 Fed., 360.

Parmenter Mfg. Co., v. *Hamilton* (Mass.), 51 N. E., 529.

Harbaugh v. *Costello* (Ill.), 56 N. E., 363.

Special attention may, however, be called to a few of these cases as showing the trend of decision upon this subject.

In re Merchants' Insurance Co. (6 N. B. R., 43) was a suit in the United States District Court of Illinois, under the Act of 1867, by a creditor of that company, to have it adjudged a bankrupt. Prior to the filing of the petition therein proceedings had been begun in a State court for the appointment of a receiver and a dissolution of the company on the ground of its insolvency, and the question was whether these facts, which were admitted, constituted an act of bankruptcy. The District Court so held, observing (p. 45):

> The object and intent of the general bankrupt law is to place the administration of affairs of *insolvent* persons and corporations *exclusively* under the jurisdiction of the Federal courts of bankruptcy; and the enactment of the general

bankruptcy law now in force suspended all actions and proceedings under State *insolvent* laws.

The court further said (pp. 45–46):

> But it is objected that the proceedings in the State court here complained of being in accordance with a general statute of this State and part of the organic law by which the respondent exists, and being predicated mainly upon the reserved right of the State to protect its citizens against irresponsible insurance companies, and the State court having acquired jurisdiction of the parties and subject-matter, this court can not now interfere as a bankrupt court and take charge of and administer the assets in question, although the insolvency of the respondent is fully conceded.
>
> It seems enough to suggest in answer to this position that, if correct, any State could effectually defeat the operation of any bankrupt law passed by Congress by simply providing that any person or corporation, if deemed insolvent or incapable of doing business by a State officer, might, under the power of exercising and enforcing police regulations or enactments by States, be wound up and its assets administered upon in the State courts, notwithstanding such person or corporation might be insolvent and guilty of all the acts of bankruptcy provided for in the general bankrupt law.

The similarity of the facts of the recent case of *In re Bruss-Ritter Co.* (90 Fed. Rep., 651) to the one at

bar is very striking. The District Court for the Eastern District of Wisconsin there said (p. 651–652):

> The petition by five creditors states a *prima facie* cause within the provisions of the recent act of Congress for an adjudication of involuntary bankruptcy against the Bruss-Ritter Company as an insolvent corporation of Wisconsin. The petition was filed November 4, 1898, and on November 11, 1898, upon petition showing cause therefor, a receiver of the effects of said corporation was appointed by order of this court. The motion to dismiss is founded solely upon the contention that the bankruptcy act of July 1, 1898, having postponed the filing of any petition for involuntary bankruptcy until November 1, 1898, was inoperative in the case at bar, because an action was commenced in the Superior Court of Milwaukee County on October 27, 1898, founded upon alleged insolvency and fraud, to take possession of the assets of the corporation for the same purposes involved in the bankruptcy proceedings, pursuant to provisions of the Wisconsin statute, which action was pending when this petition was filed, including an application for the appointment of a receiver. The power of Congress to enact a general bankruptcy statute is secured by constitutional provision. In the absence of such Congressional enactment the States are free to provide for insolvency relief of limited extent, but when Congress exercises its authority by a general enactment, all State action is suspended from such time and subject only to such limitations as may be prescribed in the act. (*Tua* v.

Carriere, 117 U. S., 201, 209.) As remarked in *Platt* v. *Archer* (9 Blatchf., 559), this authority of Congress "is paramount and exclusive, and so is the jurisdiction of the District Court thereunder."

In conclusion, the court said (p. 654):

> There is no jurisdiction to administer in the State courts causes which are clearly so defined in this act, and no ground for applying the doctrine which prevails where jurisdiction is concurrent giving priority to that which is first obtained.

In re Storck Lumber Co. (114 Fed. Rep., 360) is also instructive. In that case a court of the State of Maryland had appointed a receiver of the company, upon the petition of its sole stockholder, alleging its insolvency and praying its dissolution. Subsequently certain creditors of the company commenced proceedings in an involuntary bankruptcy in the District Court for Maryland. The receivers appointed by the State court intervened and moved to quash the petition on the ground that the jurisdiction of the State court was complete when it entered its decree dissolving the corporation, and that when the said petition was filed the defendant corporation was no longer in existence, and all its property was vested in said receiver. But the District Court said (p. 361):

> The Maryland statute for winding up insolvent corporations is in the nature of a proceeding in insolvency. * * * The National Bankrupt Act of 1898 superseded the State in-

> solvent laws, and now, when commercial and manufacturing corporations are so numerous, and are sometimes used, as in this case, more as a cover from individual liability than for more legitimate uses, it can scarcely be supposed, as the Bankrupt Act especially provides for proceedings against commercial corporations, that it was intended that such a corporation could commit acts of bankruptcy and escape the provisions of the Bankrupt Act by applying to be wound up under the State statute and thus defeat the operation of the bankrupt law.

VI.

Although the property referred to in this case was not summarily taken from the receiver of the State court, but voluntarily surrendered, the authority of the District Court to take summary action *in a proper case* can hardly be questioned.

In re Lengert Wagon Co. (110 Fed., 927), the District Court for the Southern District of New York said (pp. 927–8):

> Certain judgments were entered against the Lengert Wagon Company in the Supreme Court of the State of New York, and thereunder, on the 20th of September, 1901, property of the corporation was levied upon by the sheriff of New York County under executions issued upon the judgments. Thereafter proceedings were instituted in the State court by the directors of the corporation for a voluntary dissolution thereof on the ground of the insolvency of the corporation, and a temporary re-

ceiver of the property and effects of the corporation was appointed by an order of the court dated the 23d of September, 1901. * * *

On the 25th of September, 1901, involuntary proceedings against the corporation were commenced in this court. On the 27th of September, 1901, a receiver of the property of the bankrupt was appointed under section 2 (3) of the Bankruptcy Act, and an attempt made by him to obtain possession of the property. This was resisted by the receiver and sheriff in the State court, and the receiver in this court now applies for an order specifically directing those officers to turn the property over to him. The contention on their part is that, as the State court obtained jurisdiction of the matter and possession of the property before the proceedings were instituted in this court, the possession can not be disturbed by process issued from this court; citing *In re Chambers*, 98 Fed., 865; *Trust Co.* v. *Benbow*,, 96 Fed., 514. But the proceeding in the State court is one incident to the insolvency off the corporation, and it seems to be well settled that the Bankruptcy Act gives exclusive jurisdiction to the United States courts in such matters, where proceedings are properly instituted, and ousts the State courts of all jurisdiction with respect to the possession or distribution of insolvent estates. * * * The receiver of this court is therefore entitled to the custody of the property, but in view of the comity which exists between the Federal and State courts, and the fact that the receiver is an officer of the State court, and acting under its

> immediate direction, application should be made to it for a proper order in the case. (*In re Lesser*, 100 Fed., 433, 439.) *In the meantime the receiver in the State court will be restrained from disposing of the property in any way.*

The right of the receiver appointed by the District Court to take possession of the property is thus clearly asserted. And it will hardly be maintained that where, in accordance with the views thus announced, the receiver of the District Court *has* applied to the State court for an order directing its receiver to turn over the property and the latter court ignores or unduly delays acting upon such request, the rule of comity is so far reaching and one sided as to prevent the District Court, in the exercise of its jurisdiction and for the protection of creditors, from summarily seizing the property. But this is not the case here, for the District Court did not act summarily, but the property was voluntarily turned over to its receiver.

It is not contended that the rule of comity does not apply to bankruptcy cases, but it is contended that that rule has its limitations and ceases to apply where the State court becomes derelict in its duty.

The doctrine announced in *Peck* v. *Jenness* (7 How., 611) and subsequent cases is not a rule of comity but a rule of law, which applies only to cases where the State court had full and complete jurisdiction over the subject-matter prior to the suit in the Federal Court, or where, after the proceedings in the Federal Court are commenced, the jurisdiction of the State Court remains concurrent.

Thus, in *Peck* v. *Jenness*, the court, after stating that the District Court has exclusive jurisdiction "of all suits and proceedings in bankruptcy," observes (7 How., 623, 624):

> *But the suit pending before the Court of Common Pleas was not a suit or proceeding in bankruptcy;* and although the plea of bankruptcy was interposed by the defendants, the court was competent to entertain and judge of this plea as of any other. *It had full and complete jurisdiction* over the parties and the subject-matter of the suit; *and its jurisdiction had attached more than a month before any act of bankruptcy was committed.*

The court then goes on to say that—

> It is a doctrine of law too long established to require a citation of authorities, that *where a court has jurisdiction* it has a right to decide every question in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another court.

The case of *Johnson* v. *Bishop* (1 Woodworth, 324) was like that of *Peck* v. *Jenness*, in that the suit in the State court was to enforce a valid pre-existing lien on the property of the bankrupt, and the jurisdiction of the State court to entertain such a suit was unquestioned. It was therefore held that, although the assignee in bankruptcy was entitled to the possession of

the property of the bankrupt, he could not maintain an action in the Federal Court to take the property from the State sheriff, who had taken it upon attachment duly issued to him out of the State court, in order to enforce a valid preexisting lien, before the proceedings in bankruptcy were commenced, and whose possession was said to be that of the court. The court also observed that the Federal courts did not have exclusive jurisdiction of actions in behalf of assignees in bankruptcy, but that the jurisdiction of the State courts in such cases was concurrent—that is, concurrent *in aid of* the Federal officers and proceedings in bankruptcy.

The distinction between cases where the State court has jurisdiction and cases where it has not was pointed out by Mr. Justice Brewer, in *Clarke* v. *Larremore*, decided February 23, 1903. In that case it was contended that "the sheriff having sold the goods levied on before the filing of the petition in bankruptcy, the proceeds of the sale were the property of the plaintiff in execution, and not of the bankrupt, at the time of the adjudication, and the trustee therefore has no title to the same." But the court said:

> This contention can not be sustained. The judgment in favor of petitioner against Kenney was not like that in *Metcalf* v. *Barker* (187 U. S. 165), one giving effect to a lien theretofore existing, but one which, with the levy of an execution issued thereon, created the lien; and as judgment, execution, and levy were all within four months prior to the filing of the

> petition in bankruptcy, the lien created thereby became null and void on the adjudication of bankruptcy. *This nullity and invalidity relate back to the time of the entry of the judgment* and affect *that* and *all subsequent proceedings.*

In *Clarke* v. *Larremore* the District Court, upon the filing of a petition in involuntary bankruptcy against the defendant in the suit in the State court, and after the recovery of judgment by the plaintiff in the State court, and the levy and execution thereof by the sheriff, had issued an order restraining the sheriff from paying the money to the plaintiff in execution. The possession of the sheriff of the State court was, under the rule announced in *Peck* v. *Jenness*, the possession of the court, but as the court had no jurisdiction in the premises, the sheriff was equally without authority and could be restrained. *The right of the bankruptcy court to enjoin the officers of a State court and summarily take possession of property in their hands, when necessary to the enforcement of their exclusive jurisdiction in bankruptcy, is thus distinctly recognized.*

In the case of *Wells* (114 Fed., 222) it was held that the District Court could not enjoin an action of replevin, begun in the State court on the day after the bankruptcy proceedings were instituted, to recover property in the possession of the bankrupt, the ownership of which was claimed by the plaintiff in the replevin suit, and of which the District Court never had possession. Manifestly this is a very different case from the one here. It is not disputed that the property in the hands of the receiver of the State court was the property of

M. Zier & Co. Certainly the *Wells* case is no authority for the proposition that the District Court could not enjoin an action in a State court to get possession of what was unquestionably the property of the bankrupt.

The case of *Shields* v. *Coleman* (157 U. S., 168), upon which great reliance seems to be placed by counsel for petitioners, is equally inapplicable. In that case it was held that—

> A *Circuit Court* of the United States has not the power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a State court, and can not rightfully take the property out of the hands of the receiver so appointed by the State court.

In that case—which was not a bankruptcy case—the jurisdiction of the two courts, Federal and State, was concurrent. Both equally had the right to appoint a receiver of the railroad property in question, and the Federal court having relinquished the jurisdiction it had first acquired, by taking a bond in lieu of the property and discharging its receiver, it could not afterwards wrest the property from the receiver thereof subsequently appointed by the State court.

So, in *Louisville Trust Co.* v. *Comingor* (184 U. S., 18), it was merely held that an assignee appointed by a State court, and claiming certain sums paid to him for services, could not be summarily proceeded[1] against in the District Court, which had acquired jurisdiction

in bankruptcy of the property of the assignors, his claim to the money being adverse.

In *Bardes* v. *Hawarden Bank* (178 U. S., 524) the court pointed out that the Bankruptcy Act of 1898 (sec. 23a) clearly recognizes "the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity, on the other"—suits "between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees." It was accordingly held that clause b of section 23, which restricts such suits by trustees to the courts, State and Federal, "where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant," prevented the trustee in that case from bringing a suit in equity in the District Court, against third persons, to set aside an alleged fraudulent transfer of property made within four months of the filing of the petition in bankruptcy, without the consent of the parties so proceeded against.

In that case the court also observed:

> The powers conferred on the courts of bankruptcy by clause 3 of section 2, and by section 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of the property of the bankrupt to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant.

In *Bryan* v. *Bernheimer* (181 U. S., 189, 197) this latter observation was said to have been an inadvertence, and upon a question not arising in the case then before the court; and it was held that where the person afterwards adjudged a bankrupt had, within four months previous to the filing of the petition in bankruptcy, made a general assignment for the benefit of his creditors, and a third party had purchased the property from the assignees *after* the filing of the petition in bankruptcy, the bankruptcy court could direct a marshal appointed under the authority of clause 3 of section 2 of the Bankruptcy Act summarily to seize the same. As the purchaser from the assignee based his claim merely upon the fact that he had made the purchase in good faith, it was held that he had no title superior to that of the bankrupt's estate, and did not hold adversely.

In *Mueller* v. *Nugent* (184 U. S., 1) the referee found that Nugent, the bankrupt, had, shortly *before* the filing of the petition in bankruptcy, transferred a portion of property to his son as his agent. Upon a rule made by the referee against the latter to show cause why he should not be required to surrender the property, which was afterwards made absolute, the jurisdiction of the court was denied, on the ground that he received the property before the petition was filed. When this contention was overruled by the District Court and his commitment ordered until he pay over the amount in question, he sought to amend his pleadings so as to show that he held adversely to the bank-

rupt, and not as his agent. The District Court refused to permit this amendment, and taking the facts as found by the referee, this court said (p. 14):

> The proposition was that, as matter of law, where property of a bankrupt has come into the hands of a third party *before* the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim, the bankruptcy court has no power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed.
>
> In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the Circuit Court or to a State court, as the case may be?
>
> If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected and to determine controversies relating thereto would be seriously impaired, and, in many respects, rendered practically inefficient.
>
> The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law.

The court further said (pp. 14–15):

> It is as true of the present law as it was of that of 1867, that the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction (*Bank* v. *Sherman*, 101 U. S., 403); and on adjudication, title to the bankrupt's property became vested in the trustee (§§ 70, 21 *e*), with actual or constructive possession, and placed in the custody of the bankruptcy court.
>
> There was no pretence that at the date of the filing of this petition in bankruptcy this money of the bankrupt, $4,133.45 of which had been collected a few days, and $10,100 a few hours, before, was held subject to any adverse claim, or that the right or title thereto had been passed over to another.
>
> The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact, and therefore an adverse claim when the petition was filed, and to that we can not give our assent.

Where, therefore, the property of the bankrupt is in the hands of a receiver previously appointed by a State court, since his possession can not be said to be adverse, but is for and in virtue of the title of the bankrupt, although the rule of comity may require application to be first made to the State court for the surrender of possession, still, if that request were refused or ignored, the emergency which justified the immediate appointment of the receiver in bankruptcy would also seem

warrant the summary seizure of the property by the nkruptcy court.

All this, however, is beside the mark, since the Dis-ct Court did not in this case take summary posses-n of the property.

VII.

As has been shown, the District Court acquired pos-ssion of the property of M. Zier & Co. not by sum-ry proceedings, but orderly and peacefully, through e voluntary surrender of the same by the New Albany ust Company. Whether that company was author-d thus to relinquish possession was a matter solely tween it and the State court. It should be remem-red, however, in complete justification of the District ourt, that the petitioner Watts, who, with H. E. Jewett, peared for the New Albany Trust Company in the strict Court on the 16th and 17th of February, when e offer to surrender was made and accepted, stated at he had full authority to represent the State court the matter.

After the voluntary surrender of the property to onnor, the jurisdiction and possession of the District ourt was complete. The subsequent action of the ate court, therefore, in seizing the property out of s hands was absolutely indefensible. Whatever juris-ction it may have had of the *res* in controversy prior the institution of the bankruptcy proceedings in the istrict Court, it unquestionably had none after their stitution. The surrender of the property by Kelso

after he was cited for contempt, without an order from the State court for that purpose, sufficiently demonstrates this fact. Not having the right of possession, therefore, at the time it appointed Kelso and directed him to act, that court had no authority, either peaceably or summarily, to take possession.

If any authorities were needed in support of this proposition, it would be sufficient to refer to those cited by petitioners in respect to the alleged summary action of the District Court. Certainly, if a court having the right of possession can not summarily take possession, a court which lacks that right is equally prohibited. If it can not hold the property, by what authority, and to what end, shall it be allowed to seize it?

VIII.

I do not feel called upon to defend the action of the District Court in punishing petitioners for contempt. The power of a bankruptcy court to enforce its jurisdiction by such proceedings is unquestioned. Whether the facts presented warranted their conviction and the punishment imposed, were matters within the judgment of the District Court to determine, as they are within the power and discretion of this court to review. It may be noted, however, that counsel for petitioners do not, in their briefs, attempt any defense on this ground, but rely solely upon the question of jurisdiction.

HENRY M. HOYT,
Solicitor-General.

APRIL 20, 1903.